United Nations AT/DEC/1115

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1115

Case No. 1215: RUSER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President, Mr. Mayer Gabay; Ms. Brigitte Stern;

Whereas, on 21 August 2001, Ursula-Maria Ruser, a former staff member of the United Nations, filed an Application containing pleas which read as follows:

"**II: PLEAS**

...

8. On the merits, the Applicant respectfully requests the Tribunal to find:

a) that the Respondent arbitrarily rejected the [Joint Appeals Board (JAB)'s] recommendations;

b) that the Applicant should have rightfully been paid at the P-4 level throughout her tenure as Chief of League of Nations archives; and

c) that the Applicant's case was treated unfairly, inasmuch as the principle of equal pay for equal work was violated when budgetary provisions for her post, classified at the P-4 level, were never requested from the General Assembly throughout her seven-year tenure of the post, despite repeated complaints by the Applicant lodged as early as 1993.

9. Wherefore the Applicant most respectfully requests the Tribunal to award her the difference in salary, allowances and other entitlements between her effective level and grade and the appropriate grades at the P-4 level from 1 December 1991 until her retirement on 30 November 1998, as well as the actuarial value of the pension rights foregone as of 1 December 1998."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2002 and thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 28 February 2002;

Whereas the President of the Tribunal granted an extension of the time limit for filing Applicant's written observations until 4 May 2002;

Whereas the Applicant filed Written Observations on 27 April 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 2 November 1980, on a two-year fixed-term appointment at the P-3 level as Records Management Officer (Archivist), Office of General Services Communication, Records and Commercial Services Division. Her contract was periodically extended until 1 November 1989, when she was granted a permanent appointment. During the events which gave rise to this Application, she held the P-3 level post of Chief, League of Nations Archives and Historical Collections Unit, Conference Services Division/Library, United Nations Office at Geneva (UNOG).

On 8 March 1985, a request for reclassification of the post of Chief, League of Nations Archives and Historical Collections Unit was submitted by the Conference Services Division. Classification was approved at the P-4 level on 18 September 1985. Due to financial constraints, a budget request for the classified post was included only in the proposed programme budget for the biennium 1990-1991. This and subsequent requests made for the biennia 1992-1993, 1994-1995, 1996-1997, were also rejected.

On 5 November 1990, the Acting Chief, Compensation and Classification Service, had informed the Personnel Section, UNOG, as follows:

> "As per the [Assistant Secretary-General of Human Resources Management's] instruction dated 16 August 1988, if the classified level of a post is higher than the budget level, the department must either (a) obtain the appropriate funding

> or (2) redesign the job to match the budget level of the post. The purpose of this policy is not only to ensure the appropriate allocation of resources but also to apply the principle of equal pay for work of equal value.
>
> We have reviewed the functions of the subject post and regrettably, can identify no basis for its redesign at the P-3 level. This is due to the unique character of the post within the Geneva Library. Accordingly, a solution should be found budgetarily."

Effective 1 December 1991, the Applicant made a lateral move to the post.

On 18 August 1993, the Applicant asked the Appointment and Promotion Committee (APC) to put her post on the P-4 promotion register. In its reply of 14 December, the APC informed the Applicant that "the re-examination of your case by the Appointment and Promotion bodies did not reveal that there were sufficient grounds to amend their previous decision".

On 1 November 1995, the Applicant addressed the Director, CSD, asking him for support in regularizing her situation, reiterating her request on 16 November, to the Director-General. On 14 January 1997, in response to a request from the Chief, Personnel Service, UNOG, for a new job description for the post, as well as five others which had also been classified at a level higher than that the budgetary level over a decade earlier, the Chief Librarian stated that the job description for the Applicant's post "ha[d] not changed very much in essence, except for the fact that new information technologies are applied in certain areas". On 15 April 1997, the Chief, Personnel Service, confirmed that the functions of the Applicant's post met the criteria for classification at the P-4 level. The Applicant , relying on this confirmation wrote to the Chief, Personnel Service, asking for his support "in implementing the P-4 level of this post retroactively to the date of reclassification". On 17 December 1997, the Chief, Personnel Service, replied as follows:

> "You correctly state that the functions of the post you have been encumbering for over six years have been evaluated to be classifiable at the P-4 level. You are also probably aware that the budgetary level of your post is one grade lower than the classification findings. Consequently, it has not been possible to formally classify your post and issue the correspondent classification notice.
>
> The financial constraints of the Organization have not enable your Division to modify the budgetary provisions of your post for the current biennium. We understand, from a conversation with the Chief Librarian, that a request for upgrading this post to the P-4 level was made, but unfortunately turned down at Headquarters. No other alternative exist within your Division to make your promotion feasible."

On 30 November 1998, the Applicant retired.

On 27 December 1998, the Applicant requested the Secretary-General to review the administrative decision not to implement her post at the P-4 level and retroactively adjust her level.

On 10 April 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 August 2000. Its conclusions and recommendations read, in part, as follows:

> "**Conclusions**
>
> 93. ... [T]he Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the situation of discrepancy between the level of classification and budget of the Appellant's post.
>
> 94. The Panel finds it highly regrettable that at no time from the Biennium for 1988-1989 until today, the budget for the reclassification of the post of the Appellant was included in the proposed programme budgets submitted by the Secretary-General.
>
> ...
>
> **Recommendations**
>
> 97. Consequently, the Panel recommends that the administration pay the Appellant retroactively in compensation the difference in salary, allowances and other entitlements between her actual level and grade at the time and the appropriate grade at the P-4 level from 1 December 1991 until her retirement on 30 November 1998 as well as the actuarial equivalent of the loss of pension rights as of 1 December 1991."

On 4 June 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's findings and conclusions ...
>
> The Secretary-General considers that, even if a P-4 post had been requested from the General Assembly and the Assembly's approval for such a post had been obtained, it does not necessarily follow that you would have been automatically promoted to that post. In accordance with the Tribunal's jurisprudence, as is pointed out in the Board's report, the classification of a particular post is altogether different from the promotion of its incumbent, whose promotion to the higher level depends on the outcome of the regular review process.

> In considering the Board's recommendation that you should be compensated for the higher-level functions you performed, the Secretary-General observes that the decision to compensate staff for performing higher-level functions is discretionary and subject to the availability of a post. In the absence of an available post in this case, there is no abuse of discretion in deciding not to pay such compensation. Moreover, para.7 of administrative instruction ST/AI/277, which is applicable to this case, indicated that in the context of an upward post reclassification, it is permissible for an incumbent to continue to be remunerated on the basis of the incumbent's lower grade even though the level of the post is higher.
>
> In light of the above considerations, the Secretary-General cannot accept the Board's recommendation of compensation. However, taking into account the totality of circumstances in this case, the Secretary-General agrees with the Board that the Administration was obligated to find a solution to the discrepancy between the level of the functions and the budgetary level of the post and that it should do so on a timely manner. Acknowledging that such a timely solution was not found in your case, he has decided that you should be compensated in the amount of three months net base salary at the rate in effect at the time of your separation from service."

On 21 August 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the principle of equal work for equal pay in denying the Applicant adequate compensation for the work she performed.

2. In placing the Applicant against the post, the Respondent performed a review process tantamount to a promotion exercise.

3. The Applicant is entitled to compensation for the delays in her case.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion, *a fortiori* to retroactive promotion.

2. Additional budgeting had been requested for the Applicant's post, but had not been granted. Even if additional funds had been budgeted for the Applicant's post, the Applicant would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty.

3. The inability to provide budgetary support for the Applicant's post was not improperly motivated.

4. The award of a Special Post Allowance is discretionary and the Applicant had no right to compensation at the higher level.

The Tribunal, having deliberated from 11 to 24 July 2003, now pronounces the following Judgement:

I. The Applicant is appealing hereby the Secretary-General's decision dated 4 June 2001 to reject the JAB's recommendations in her favour. Concluding that the Respondent violated the principle of equal pay for equal work, the JAB found that as a result of Respondent's failure to correct the discrepancy between the level of classification and the budget of her post, the Applicant was denied proper compensation for her work.

II. It is well established that the Organization is empowered with wide ranging discretionary control over matters involving promotions (see Judgement No. 1056, *Katz* (2002)). Nevertheless, the exercise of that power is not without its limits. The Tribunal has defined and clearly imposed restrictions on its application, for example, in cases of management abuse of authority, procedural or substantive error or due process denials. (See Judgement No. 1031, *Klein* (2001).)

III. The Applicant seeks redress for the Respondent's failure to pay her proper salary and other entitlements on a par with the job functions she had actually performed.

IV. The Applicant began her career with the Organization on 2 November 1980 and attained permanent status on 1 November 1989. On 1 December 1991, the Applicant was transferred to the post of Chief, League of Nations Archives and Historical Collections Unit, in the Library, UNOG, at the P-3 level.

V. On 8 March 1985, a request for reclassification of the Applicant's post was submitted and approved at the P-4 level on 18 September of that year, subject to budgetary provisions. A budget request was not submitted until the proposed budget for the biennium 1990-1991 but this request and subsequent were rejected. In August 1993, the Applicant asked the Geneva Appointment and Promotion Committee to put her post on the P-4 promotion register, but her request was denied.

VI. On 27 December 1998, the Applicant requested the Secretary-General to review the administrative decision not to implement her post at the P-4 level and retroactively adjust her level, and to provide appropriate financial adjustment to equalize her compensation with her actual work for the entire period of her employment as Chief of her office.

VII. On 30 November 1998, the Applicant retired at P-3, step 15 level, and on 10 April 1999 filed an appeal with the JAB in Geneva against the administrative refusal to advance her post to the P-4 level. As part of its decision the JAB recommended that the Organization pay the Applicant the salary differential. On 4 June 2001 the Applicant was informed that the Secretary-General rejected the JAB's recommendation. This Application followed.

VIII. In effect, the Applicant claims she was improperly and unjustly compensated when the Organization failed to remedy the discrepancy that existed between the budgetary level of her post and the higher level job functions she actually performed.

IX. Not surprisingly, the Respondent asserts that the Applicant did not have a right to promotion, *a fortiori* to retroactive promotion, maintaining that he possesses wide discretionary powers in promotional matters. The Tribunal indeed, concedes that appointments and promotions are within the broad discretion of the Secretary-General but as stated earlier, this power is neither absolute nor unfettered (see Judgement No. 870, *Choudhury* and *Ramchandani* (1998) para. IV).

X. Claiming that the Applicant indeed received full and fair consideration at every stage of the process and that the inability to provide budgetary support for the Applicant's post was not improperly motivated, the Respondent submits that, notwithstanding any other consideration, the Applicant could not, at any rate, have been promoted to her reclassified post without such budgetary support. Moreover, even if such budgetary support had been available for the Applicant's post, the Respondent states, the Applicant would have been required, in any event, to undergo a regular promotion review process. In response, the Applicant claims that the

decision-making process was flawed, not timely, and violated her due process rights and her right to full and fair consideration.

XI. The JAB, in support of the Applicant's position, made the following recommendation:

> "The Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the situation of discrepancy between the level of classification and the budget of the Appellant's post ...
>
> It is regrettable that this situation is still not resolved. For the Appellant, since she took over the post in 1991, this resulted in performing for seven years the duties and responsibilities of a post classified at the P-4 level with a P-3 salary until she took her retirement in 1998."

XII. The Tribunal has recognized that the Respondent's discretionary power to promote staff members is subject to Article 101 of the Charter and staff regulation 4.2 which states "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity". In order to achieve this purpose, "It is indispensable that "full and fair consideration should be given to all applicants for a post and that the Respondent bears the burden of proof with respect to this". (See Judgement No. 828, *Shamapande*, (1997) paras. V and VI.).)

XIII. The Organization was under a strict obligation to regularize the Applicant's post and correct the discrepancy between the level of classification and her actual job function. The Respondent's failure to do so, violated the Applicant's right to full, fair and just consideration. Thus, the Applicant should be paid retroactively the difference in salary, allowances and other entitlements between her actual level and grade at the time and the appropriate grade at the P-4 level from 1 December 1991 until her retirement on 30 November 1998 as well as the actual equivalent of the loss of pension rights as of 1 December 1991.

XIV. In addition the Applicant should be compensated by six months net base salary for the delays and moral injury she suffered from the Respondent's failure to properly implement the classification of her post.

XV. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant retroactively the difference in salary, allowances and other entitlements between her actual level and grade at the time and the appropriate grade at the P-4 level from 1 December 1991 until her retirement on 30 November 1998 as well as the actual equivalent of the loss of pension rights as of 1 December 1991;

2. Orders the Respondent to pay the Applicant six months net base salary at the rate in effect on the date of separation from service; and,

3. Rejects all other pleas in their entirety.

(Signatures)

Julio **Barboza**
President

Mayer **Gabay**
Vice-President

Brigitte **Stern**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Executive Secretary

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